MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-4194

PITTSBURGH PRESS COMPANY,
Petitioner.

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

and

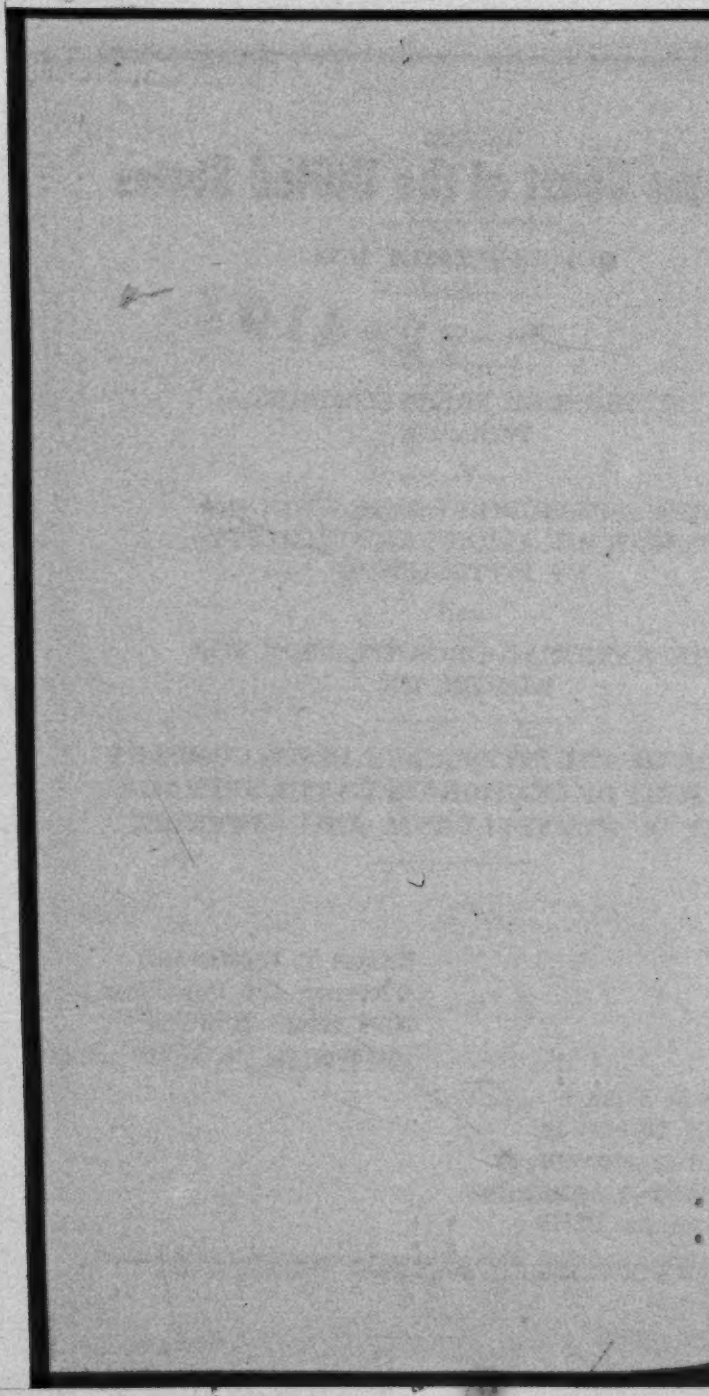
THE NATIONAL ORGANIZATION FOR WOMEN, INC.

PETITION OF THE PITTSBURGH PRESS COMPANY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

RALPH T. DESTEFANO
Attorney for Petitioner
2900 Grant Building
Pittsburgh, Pa. 15219

CHARLES R. VOLK
ROBERT H. SHOOP, JR.
CARL H. HELLERSTEDT, JR.
THORP, REED & ARMSTRONG
Pittsburgh, Pa. 15219

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219



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THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,
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PETITION OF THE PITTSBURGH PRESS COMPANY FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

To The Honorable, The Chief Justice of The United States, and The Associate Justices of The Supreme Court of The United States:

The petitioner, the Pittsburgh Press Company, appellant in the Court below, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania entered in the above case on June 21, 1972, denying the grant of the petition for allowance of appeal to review the Order and decision of the Commonwealth Court of Pennsylvania entered January 27, 1972.

OPINIONS BELOW

The decision and order of the Pittsburgh Commission on Human Relations of July 23, 1970 finding that the Pittsburgh Press Company violated Ordinance No. 75 of the City of Pittsburgh, as amended by Ordinance No. 395, by aiding in discrimination against women, and ordering that it utilize a classification system of employment advertisements with no reference to sex, is set forth at page R. 1a* of the Appendix filed herewith.

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania of March 24, 1971 which affirmed the order of the Pittsburgh Commission on Human Relations is set forth at page R. 19a of the Appendix filed herewith.

The opinion of the Commonwealth Court of Pennsylvania of January 27, 1972 modifying the order of the Pittsburgh Commission on Human Relations and the Order of the Court of Common Pleas and affirming said orders as modified, is reported at 4 Pa. Cmwlth 448, 287 A. 2d 161 (1972) and is set forth at page R. 46a of the Appendix filed herewith.

The per curiam opinion of the Supreme Court of Pennsylvania of June 12, 1972 denying the petition requesting allowance to appeal the decision of the Commonwealth Court of Pennsylvania is set forth at page R. 80a of the Appendix filed herewith.

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* References designated by "R." are to pages of the Appendix filed herewith.

JURISDICTION

The decision of the Supreme Court of Pennsylvania denying the petition requesting allowance to appeal the decision and order of the Commonwealth Court of Pennsylvania was entered on June 12, 1972 by per curiam opinion. (R. 80a) A review of the June 12, 1972 decision will necessarily entail a review of the prior decision and order of the Commonwealth Court of Pennsylvania in this case entered January 27, 1972. (R. 46a). The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Does the ordinance of the City of Pittsburgh prohibiting a newspaper from arranging help-wanted advertisements under columns labeled "Jobs-Male Interest," Jobs-Female Interest," and "Jobs-Male-Female" violate the First Amendment of the United States Constitution?

2. Is it a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution for a newspaper to be found in violation of the City of Pittsburgh Ordinance as aiding advertisers in discriminating against women when no evidence was produced to demonstrate that an advertiser discriminated against women in violation of the ordinance?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides in part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Fourteenth Amendment of the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The case arose on October 9, 1968 when the National Organization for Women, Inc. (N.O.W.) filed a complaint with the Pittsburgh Commission on Human Relations (Commission) charging the petitioner-appellant Pittsburgh Press Company (Press) with violations of Section 8(j) of Ordinance No. 75, as amended by Ordinance No. 395 of the City of Pittsburgh (R. 82a). The Commission found, with one dissenting vote, that probable cause existed to file a complaint, and on November 3, 1969, a public hearing was directed. On January 15 and 16 and February 12 and 26, 1970, hearings were held before the Commission.

At the hearings N.O.W. introduced witnesses who testified at length about the traditional roles of women in the job market and of the discrimination practiced by employers against women. N.O.W. argued that the Press was aiding this discrimination and therefore violating the ordinance in question by arranging its help-wanted advertisements in categories labeled "Jobs-Female Interest" "Jobs-Male Interest," and "Jobs-Male-Female." No evidence was introduced to prove that a female was refused a job advertised under the "Male Interest" classification, or that a male was refused a job classified under the "Female Interest" classification.

In its pleadings and at the hearings before the Commission, the Press repeatedly contended that it was denied due process in that it was accused of aiding in the commission of an unlawful act which was not alleged or proven. The Press also contended and introduced testimony that the classification system it used

was designed solely to maximize reader response by facilitating study of its columns by job seekers, and that the cultural and biological differences between men and women were reflected in general patterns of job preference by them and a newspaper has a right to recognize these preferences in the way it arranges its advertising.

On July 23, 1970 the Commission issued its order providing that the Press must utilize a classification system of employment advertisements with no reference to sex. The Press appealed the order to the Court of Common Pleas of Allegheny County, Pennsylvania. The American Newspaper Publishers Association (ANPA) which had intervened in the Commission proceedings as amicus curiae, was permitted by the Common Pleas Court to again intervene as amicus curiae.

The Press and the ANPA argued that it was a denial of due process of law to find the Press guilty of aiding in any unlawful discriminatory employment practices against females when there was no proof of a single violation of the ordinance by an advertiser of the Press or that a female had ever been denied a job listed under the "Male Interest" column heading because of her sex. The Common Pleas Court found that it was not necessary to prove a specific act of discrimination in order to find that the Press was aiding in an unlawful employment practice. The general designation of sex in the column heading was found to constitute "aiding" in discrimination under the statute without proof a specific discriminatory action by an advertiser (R. 36a).

The Press also argued that it was a denial of its First Amendment rights to require that it not print

help-wanted classified advertisement column headings with any mention of sex. The Common Pleas Court found that such a prohibition is not a denial of First Amendment rights inasmuch as the classified advertisement section of the Press was a commercial rather than editorial aspect of the newspaper and that the Commission's prohibition of the use of any reference to sex in column headings was justified solely on the basis that the general captions referring to male and female were offensive to the ordinance. (R. 43a, 44a) By order dated March 24, 1971 the Court of Common Pleas of Allegheny County affirmed the order of the Commission solely on testimony given at the Commission hearings.

The Press appealed the decision of the Court of Common Pleas to the Commonwealth Court of Pennsylvania. The Commonwealth Court, in a sharply divided opinion, upheld the decisions and findings of the Commission and the Court of Common Pleas, concluding that the Press was not denied due process of law by having found to be "aiding" in discrimination when no specific incident of discrimination by an advertiser was shown. The Court reasoned that since the column heading were per se discriminatory, there need not be a showing that any women actually suffered any act of discrimination (R. 57a).

On the issue of denial of First Amendment rights, the Commonwealth Court held that advertising, per se, does not come within the purview of the First Amendment and that a prohibition from using sex designated want-ad headings was conduct subject to regulation. (R. 65a).

Two judges of the Commonwealth Court dissented, stating that it was a denial of due process of law to find the Press in violation of the ordinance as aiding an employer when no violation by such employer had been alleged or proven (R. 71a, 79a).

The Press petitioned the Supreme Court of Pennsylvania for allowance of appeal to review the decision and order of the Commonwealth Court. By per curiam opinion dated June 12, 1972, the Supreme Court of Pennsylvania denied the petition for allowance of appeal, with one justice of the opinion that the appeal should be allowed to review the First Amendment question presented. (R. 80a).

REASONS FOR ALLOWANCE OF THE WRIT

The Commonwealth Court of Pennsylvania held that it was not a denial of due process of law for petitioner to be found in violation of the ordinance as aiding an employer in discrimination without proof that any such employer violated the ordinance by discriminating against a female in employment, and that the First Amendment did not prohibit a newspaper from being required to arrange its classified help-wanted advertisements in the manner directed by the Commission.

Many newspapers throughout the United States use the same sex designated classification scheme as petitioner. Lower federal courts have already been required to pass upon the First Amendment questions presented by legislation interpreted to prohibit such classification schemes. See *Brush v. San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D.Calif. 1970); *Greenfield v. Field Enterprises, Inc.*, ... F. Supp. ...., (4 E.P.D. 7763, W.D. Ill. 1972). The constitutional questions of First Amendment Rights raised by the circumstances of this case are of national importance.

Moreover, the problem of what standard of due process is required in the demonstration of the existence of a discrimination in circumstances where no direct discriminatory effect of the challenged activity can be shown presents issues of pressing judicial importance as legislation extends the scope of judicial inquiry into the heart of social institutions and relationships.

The petition for a writ of certiorari should be granted to determine the important issues of due process and First Amendment protection raised by this case.

ARGUMENT

ARGUMENT IN SUPPORT OF REASONS

I

The Ordinance of the City of Pittsburgh Prohibiting a Newspaper from Arranging Help Wanted Advertisements Under Columns Labeled "Job-Male Interest", "Jobs-Female Interest" and "Jobs-Male-Female" Violates the First Amendment

The Pittsburgh Press Company is of the opinion that the arrangement of help-wanted advertisements under column headings designated "Jobs-Male Interest", "Jobs-Female Interest" and "Jobs-Male-Female" does not discriminate against women, but to the contrary is beneficial to both sexes in that it enables any person to quickly locate possible employment opportunities which are in areas of employment populated more heavily with one sex than another. The column headings are not formulated in the prospect of commercial gain to the Pittsburgh Press Company, but rather are solely a reflection of what it believes to be in furtherance of the most convenient classification for its readers, what is preferred by its readers, and is a classification which has a rational basis in that it merely reflects the present dominant employment interest patterns of the sexes.

The official government view, as set forth by the Pittsburgh Human Relations Commission and the City of Pittsburgh, is that such column headings reflect outmoded social concepts of the social and economic positions of women and are in and of themselves a

device to aid in the repression of the employment opportunities of women deserving of prohibition.

The First Amendment of the United States Constitution forbids the imposition by governmental authorities of a socio-economic set of values which prohibits the Pittsburgh Press Company from arranging its newspaper in a manner which it feels best meets the needs of its readers and which arrangement embodies a commentary of what types of employment may be of more interest to one sex than to another. That embodiment of this commentary in the form of sex designated column headings in the help-wanted sections of the newspaper cannot be regulated by government action to appear only on the editorial pages.

That such column heading may prompt discomfort or dissatisfaction with some women or governmental authorities is not sufficient to prohibit their printing. *New York Times Co. v. United States,* 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

As stated by the Court in *Terminiello v. City of Chicago,* 337 U.S. 1, pp. 4, 5 (1949):

> * * * The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under one system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to

anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, [Citation omitted], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [Citations omitted] There is no room under our Constitutional for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

The Pittsburgh Press Company does not forfeit its constitutional rights merely because they receive payment for the individual subscribers to the classified help wanted section, as assumed by the Commonwealth Court of Pennsylvania (R. 65a). *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Ginsburg v. United States*, 383 U.S. 463, 474 (1966).

The arrangements and placing of its advertising is a legitimate judgmental function of a newspaper. How to place accent or print an ad invokes editorial judgment; how to arrange whole pages of advertising to best service the readers, even more so. Governmental judgment intrudes upon editorial discretion when it tells a newspaper how to arrange its advertising. This intrusion is not merely a commercial regulation; it substitutes governmental judgment for that of the editor as to how best to serve the reader. Such governmental intrusion should be proscribed.

The fact that the Ordinance has the laudable purpose of eliminating discrimination against women in employment does not provide it with talismanic immunity from constitutional limitations, nor does constitutional protection turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963).

The order of the Commonwealth Court of Pennsylvania prohibits the Pittsburgh Press Company from utilizing sex designated employment advertising column headings, with the exception that those advertisements certified as exempt by the Pittsburgh Commission on Human Relations may be placed under such otherwise prohibited column headings. Such an exemption may be granted by the Commission pursuant to Section 7(d) of the Ordinance if it is demonstrated that sex is a bona fide occupational qualification for the job in question. (R. 90a)

The effect of this exemption scheme is to force the Pittsburgh Press Company to act as an enforcement arm of the Commission to insure in advance that any advertisement which is placed seeking one sex is in fact entitled to the benefit of the exemption. Such a scheme amounts to a prior restraint on the First Amendment freedoms of the Pittsburgh Press Company. Such attempts to make newspapers screening devices for compliance with governmental commands have a heavy burden of justification not met in the circumstances of this case. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Smith v. California*, 361 U.S. 147 (1959).

ARGUMENT IN SUPPORT OF REASONS

II

It is a Denial of Due Process of Law Under the Fifth and Fourteenth Amendments to Find that a Newspaper Aided an Employer in Discrimination in Hiring Solely by Arranging Help-Wanted Advertisement Under Sex-designated Column Headings Without Proof that an Advertiser Discriminated In Hiring in Violation of the Ordinance

The Commonwealth Court of Pennsylvania concluded that the mere designation of classified help-wanted employment advertisements with column headings "Jobs-Male Interest", "Job-Female Interest" and "Jobs-Male Female" constituted discrimination per se without proof that employers advertising under such headings discriminated in regard to sex in employment in violation of the ordinance:

> If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific "particular" on an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first women actually suffered any act of discrimination. [footnote omitted] (R. 57a)

> * * * What is important is that through the use of its arbitrarily selected column headings the Pittsburgh Press "aids" such employees to discriminate. When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. (R. 61a)

Two Judges of the Commonwealth Court strongly dissented on the question of whether due process of law was accorded the Pittsburgh Press Company. Judge Mencer stated the following in his dissent:

"The Complaint does not allege any violation by anyone else. It is simply impossible for the Appellant to be guilty of aiding another in the violation of the ordinance when no violation is even alleged and in fact no attempt was made to prove such a violation. It is fundamental that one cannot aid that which did not occur.

"I must conclude that due process clearly requires that, without alleging or proving a violation of the ordinance by an employer who was aided by appellant, the complaint is valid on its face and should be dismissed." (R. 79a)

Judge Crumlish, Jr. made the following observations in his dissenting opinion:

I believe that the factual findings of the Commission, as recited in either the formal findings of fact or the text of the Commission's opinion are not sufficient to support the conclusion that advertising in gender-segregated columns establishes of itself discrimination in employment. Absent proof, Pittsburgh Press cannot be justifiably accused of aiding in an unlawful employment practice. (R. 71a)

* * *

It is most unfortunate and disturbing to me to observe that in this landmark litigation, the adjudicating body has chosen to disregard the evidence presented it; that instead of seeking proof of its position, it has chosen to rely on unsubstantiated

> hunches and feelings. * * * The Commission's opinion and findings of fact do not substantiate their position that gender-segregated advertising is an unlawful employment practice. (R. 75a, 76a)

No matter how strong the current of popular sentiment, it cannot be permitted to displace the constitutional requirement that a violation of an ordinance subjecting the wrongdoer to fines and possible imprisonment (R. 103a) must be substantiated by proof of the wrong alleged. In the zeal to insure the right of women to be free from discrimination, government cannot build the foundation of such equal rights by eroding the basic protections of due process of law:

> It has been long established by the Court that no principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused. . . . [*Cole v. Arkansas,* 333 U.S. 196, 201 (1948)]

The Pittsburgh Press has been placed in the position of being found as aiding in the discrimination in hiring of women without knowledge that any advertiser has in fact used its classified advertisements as a device to deny women equal consideration for employment positions. The determination of guilt without knowledge of the unlawful activity was found unconstitutional in *Smith v. California,* 361 U.S. 147 (1959) and should be so determined in this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RALPH T. DESTEFANO
Attorney for Petitioner
2900 Grant Building
Pittsburgh, Pa. 15219

CHARLES R. VOLK
ROBERT H. SHOOP, JR.
CARL H. HELLERSTEDT, JR.
THORP, REED & ARMSTRONG
Pittsburgh, Pa. 15219

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